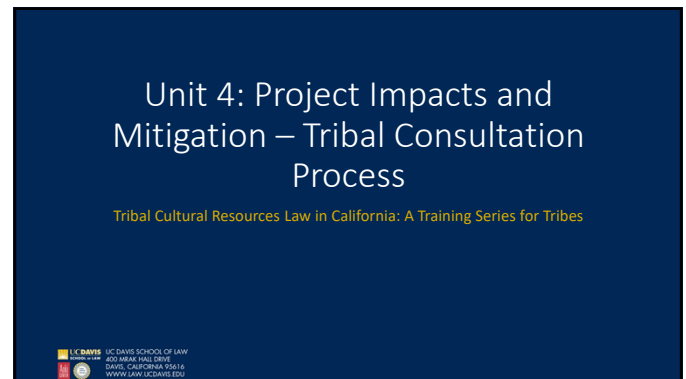
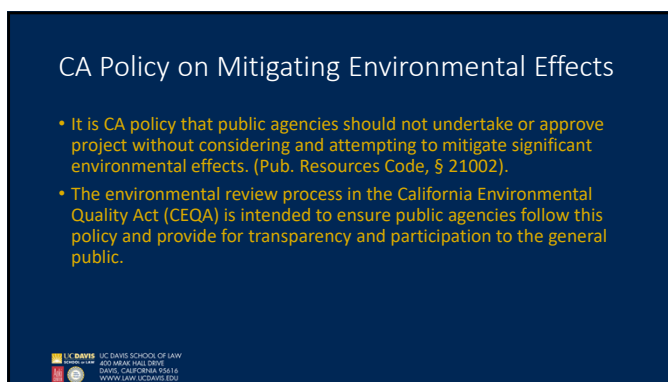




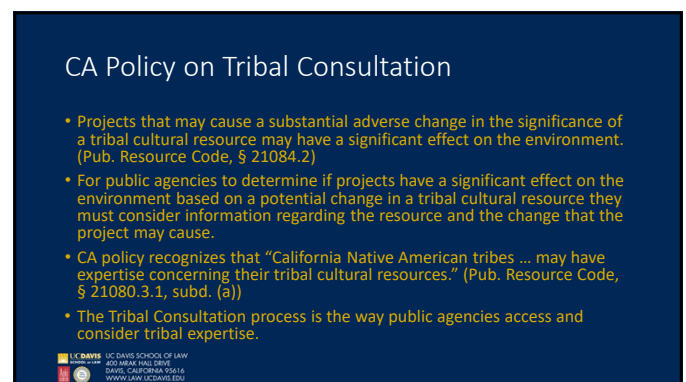
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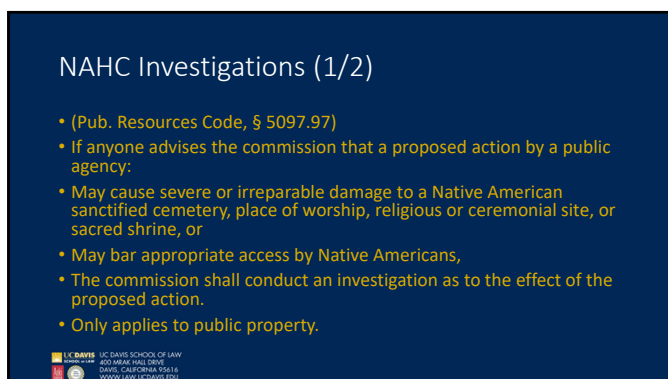
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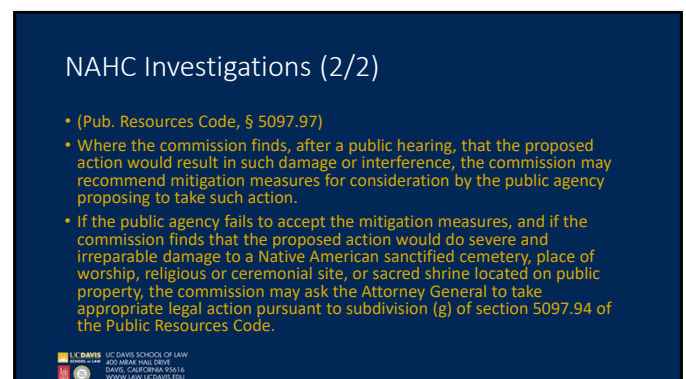
3



4



5



6

## Tribal Cultural Resources Determinations

Legal definitions and considerations



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7

## Tribal Cultural Resources Definition

- (Pub. Resources Code, § 21074)
- (Added by Stats. 2014, Ch. 532, Sec. 4. (AB 52) Effective January 1, 2015.)
- "Tribal cultural resources" meet one of two criteria
  - On or eligible for the CA or Local Register of Historical resources; or
  - Lead Agency Determination
- Both have references to other criteria in other codes



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8

## Criteria One: Register of Historical Resources

1. Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:
  - A. Included or determined to be eligible for inclusion in the California Register of Historical Resources.
  - B. Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.
- 5020.1 (k) "Local register of historical resources" means a list of properties officially designated or recognized as historically significant by a local government pursuant to a local ordinance or resolution.
- A cultural landscape must be geographically defined in terms of the size and scope of the landscape.



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9

## California Register of Historical Resources

- 5024.1 Criteria [Public Resources Code]
- (c) A resource may be listed as an historical resource in the California Register if it meets any of the following National Register of Historic Places criteria:
  - Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage.
  - Is associated with the lives of persons important in our past.
  - Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values.
  - Has yielded, or may be likely to yield, information important in prehistory or history.



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10

## Criteria Two: Lead Agency Determination

- A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of section 5024.1.
- In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.



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11

## Additional Possible Tribal Cultural Resources

- The following may also be a tribal cultural resource if meets criteria 1 or 2 otherwise:
- Historical Resource
- Unique Archaeological Resource,
- "Nonunique Archaeological Resource",



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12

## Historical Resource

- See Public Resources Code section 21084.1
- Refers back to Register of Historical Resources

13

## Unique Archaeological Resource

- (Pub. Resources Code, § 21083.2 subd. (g))
- “unique archaeological resource” means an archaeological artifact, object, or site about which it can be clearly demonstrated that, without merely adding to the current body of knowledge, there is a high probability that it meets any of the following criteria:
  1. Contains information needed to answer important scientific research questions and that there is a demonstrable public interest in that information.
  2. Has a special and particular quality such as being the oldest of its type or the best available example of its type.
  3. Is directly associated with a scientifically recognized important prehistoric or historic event or person.

14

## “Nonunique Archaeological Resource”

- (Pub. Resources Code, § 21083.2, subd. (h))
- “nonunique archaeological resource” means an archaeological artifact, object, or site which does not meet the criteria in subdivision (g) [Unique Archaeological Resource]

15

## What this means for Tribes

- If a site, feature, cultural landscape, sacred place or object with cultural value to a California Native American tribe is included or already determined to be eligible for inclusion on the California Register of Historical Resources or on a local register of historical resources it IS a tribal cultural resource.
- There is nothing for the tribe or the lead agency to prove.
- If not, the lead agency gets to make a discretionary determination whether the resource meets those criteria.
- It will need substantial evidence to do so.

16

## Effects (Impacts) on Tribal Cultural Resources

Avoidance, mitigation generally

17

## Environmental Impact Reports – EIR - Purpose

- (Pub. Resource Code, § 21002.1)
- (a) The purpose of an environmental impact report is to:
  - ✓ identify the **significant effects** on the environment of a project,
  - ✓ identify alternatives to the project, and
  - ✓ indicate the how those significant effects can be **mitigated or avoided**.

18

## Significant Effects v. Impacts

- Code language says “effects” and “significant effects” and “significant adverse impacts”
- Commonly hear the term “impacts”, “significant impacts”, “adverse impacts” when referring to projects affecting Tribal Cultural Resources

19

## Mitigation of Significant Effects

- (Pub. Resource Code, § 21002.1)
- (b) Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.
- (c) If economic, social, or other conditions make it infeasible to mitigate one or more significant effects on the environment of a project, the project may nonetheless be carried out or approved at the discretion of a public agency if the project is otherwise permissible under applicable laws and regulations.

20

## Lead Agency v. Responsible Agency

- (Pub. Resource Code, § 21002.1)
- (d) The responsibility of the lead agency shall differ from that of a responsible agency.
- The lead agency shall be responsible for considering the effects, both individual and collective, of all activities involved in a project.
- A responsible agency shall be responsible for considering only the effects of those activities involved in a project which it is required by law to carry out or approve.

21

## Significant Environmental Effects - EIR

- (Pub. Resource Code, § 21002.1)
- (e) Lead agencies shall focus the discussion included in the environmental impact report (EIR) on those potential effects on the environment resulting from a proposed project which the lead agency has determined are or may be significant
- Lead agencies may limit discussion on other effects (non-significant effects) to a brief explanation as to why those effects are not potentially significant

22

## Tribal Cultural Resource – Significant Effects

- (Pub. Resource Code, § 21084.2)
- A project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment.
- (Pub. Resource Code, § 21084.3)
- (a) Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.

23

## Exemptions from EIR

- (Pub. Resources Code, § 21080, subs. (c) and (d)).
- Exemptions from the EIR are allowed if:
  - there is no evidence significant effects, or
  - the effects can be mitigated (clearly and completely), or
  - the project is statutorily exempt from CEQA,
- (Pub. Resources Code, § 21074, subd. (c); Cal. Code Regs., tit. 14, § 15300.2 (f)).
- A categorical exemption may not be used if the tribal cultural resource in question is also an historical resource.

24

## EIR Mitigation Requirements

- (Pub. Resources Code, § 21082.3, subd. (b))
- If a project may have a “significant impact” on a tribal cultural resource, the lead agency’s environmental document shall discuss both of the following:
  1. Whether the proposed project has a significant impact on an identified tribal cultural resource.
  2. Whether feasible alternatives or mitigation measures, including those agreed upon pursuant to the consultation process, avoid or substantially lessen the impact on the identified tribal cultural resource.

25

## Tribal Cultural Resources Mitigation Examples

- (Pub. Resource Code, § 21084.3, subd. (b))
- (b) If the lead agency determines that a project may cause a substantial adverse change to a tribal cultural resource, and measures are not otherwise identified in the consultation process provided in Section 21080.3.2 then,
- The following are examples of mitigation measures that, if feasible, may be considered to avoid or minimize the significant adverse impacts:
  1. Avoidance and preservation of the resources in place.
  2. Treating the resource with culturally appropriate dignity considering the tribal cultural values and meaning of the resource.
  3. Permanent conservation easements or other interests in real property.
  4. Protecting the resource.

26

## Avoidance

- (Pub. Resource Code, § 21084.3, subd. (b)(1))
- Avoidance and preservation of the resources in place, including, but not limited to, planning and construction to avoid the resources and protect the cultural and natural context, or planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.

27

## Treating with Dignity – Protection

- (Pub. Resource Code, § 21084.3, subd. (b)(2))
- Treating the resource with culturally appropriate dignity taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:
  - A. Protecting the cultural character and integrity of the resource.
  - B. Protecting the traditional use of the resource.
  - C. Protecting the confidentiality of the resource.

28

## Conservation Easements

- (Pub. Resource Code, § 21084.3, subd. (b)(3))
- Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.

29

## Protection - Generally

- (Pub. Resource Code, § 21084.3, subd. (b)(4))
- Protecting the resource.

30

## Tribal Consultation

Tribal input on mitigation measures for the environmental impact report



31

## CEQA Review Summary – With Consultation

- Tribe requests notice of all proposed projects within their traditional geographic area
- Project application is submitted to lead agency for preliminary review for completeness
- Application is deemed complete by the lead agency
- The lead agency has 14 days to notify the tribe of the proposed project
- California Native American tribe has 30 days to request consultation
- The consultation process begins within 30 days of tribe's request for consultation
- Initial Study done by lead agency
- **Negative Declaration or Environmental Impact Report (EIR) drafted**
- **Tribal Consultation is ongoing**
- Final Negative Declaration or EIR certified
- Tribal consultation concludes
- Project approved (modified or denied)



32

## EIR – The Heart of the CEQA Process

- The EIR is used to determine if a project is approved or denied.
- It must go through public review and, if tribal cultural resources are involved, tribal consultation before being certified as complete.
- Most consultation will revolve around what will be included in the EIR.
- If the mitigation measures are included, it is important to understand what they are and ensure that they are being followed.



33

## Tribal Consultation Process

- (Pub. Resources Code, § 21082.3, subd. (d)).
- The consultation process must follow Public Resources Code section 21080.3.1 and 210803.2
- TRAINING NOTE: This process is explained in detail in Unit 3.



34

## Consultation Meaning

- (Pub. Resources Code, § 21080.3.1; Gov Code § 65352.4)
- Same as for general plan
- “ ‘consultation’ means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where feasible, seeking agreement.”
- Consultation with Native American tribes shall be mutually respectful of each party's sovereignty
- Consultation shall recognize the potential needs for confidentiality with respect to places that have traditional tribal cultural significance



35

## Consultation on Mitigation Measures

- (Pub. Resources Code, § 21080.3.2, subd. (a))
- (a) As a part of the consultation pursuant to Section 21080.3.1, the parties may propose mitigation measures, including, but not limited to, those recommended in Section 21084.3, capable of avoiding or substantially lessening potential significant impacts to a tribal cultural resource or alternatives that would avoid significant impacts to a tribal cultural resource.
- The NAHC has form letters on its website for tribes to use to request consultation.



36

## Consultation Topics

- (Pub. Resources Code, § 21080.3.2, subd. (a))
- Upon request of the Tribe consultation shall include:
  - alternatives to the project,
  - recommended mitigation measures, or
  - significant effects
- The consultation may also include:
  - discussion concerning the type of environmental review necessary,
  - the significance of tribal cultural resources,
  - the significance of the project's impacts on the tribal cultural resources, and,
  - if necessary, project alternatives or the appropriate measures for preservation or mitigation that the California Native American tribe may recommended to the lead agency.



37

## Concluding Consultation

- (Pub. Resources Code, § 21080.3.2, subd. (b))
- The consultation shall be considered concluded when either of the following occurs:
  - (1) The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource.
  - (2) A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.



38

## Additional Information

- (Pub. Resources Code, § 21080.3.2, subd. (c)(1))
- The legal consultation process does not limit the ability of a tribe or the public to submit information to the lead agency regarding the significance of the tribal cultural resources, the significance of the project's impact on tribal cultural resources, or any appropriate measures to mitigate the impact.
- Therefore, anyone can submit information about tribal cultural resources protection pertaining to a project even if they do not qualify for or participate in the consultation process.



39

## Lead Agency Discretionary Mitigation

- (Pub. Resources Code, § 21080.3.2, subd. (c)(2))
- This section does not limit the ability of the lead agency or project proponent to incorporate changes and additions to the project as a result of the consultation, even if not legally required.
- Meaning the lead agency can use discretion to incorporate recommended mitigations beyond what is legally required.



40

## Participation of Project Proponent

- (Pub. Resources Code, § 21080.3.2, subd. (d))
- If the project proponent or its consultants participate in the consultation, those parties shall respect the principles set forth in this section.



41

## Mitigation Measures & Monitoring

- (Pub. Resources Code, § 21082.3, subd. (a)).
- If mitigation measures agreed upon in the consultation process are determined to avoid or lessen the impacts to tribal cultural resources under the EIR report requirements,
- The measures shall be recommended for inclusion in the environmental document (EIR) and,
- In an adopted mitigation monitoring and reporting program.
- The mitigation measures are fully enforceable.



42

## Cultural Monitoring

- (Pub. Resources Code, § 21082.3, subd. (a)).
- When mitigation measures are indicated an “adopted mitigation monitoring and reporting program” may be included in the EIR
- Use the consultation process to agree on and “adopt” a program to provide for the monitoring and reporting of the mitigation measures of the project.
- This process has come to be known as “cultural monitoring”

43

## Mitigation Measures – Minimum Standard

- (Pub. Resources Code, § 21082.3, subd. (e))
- If substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, and
- If mitigation measures agreed upon and recommended by staff are not included in the environmental document or if there are no agreed upon mitigation measures, then
- the lead agency shall consider feasible mitigation measures pursuant to subdivision (b) of Section 21084.3 (general examples of mitigation measures previously reviewed).

44

44

## Confidentiality

Requirements for the CEQA Consultation Process

45

## Confidentiality – CEQA Consultation

- (Pub. Resources Code, § 21082.3, subds. (c)(1) & (f))
- Pursuant to Government Code sections 6254, subd.(r) and 6254.10
- Any information – not just documents – submitted by a California Native American tribe during the environmental review process shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public without prior consent of the tribe.
- Any information that is published must be included in a confidential appendix

46

46

## Confidentiality – Generally, Code Language

- (See Gov. Code, § 6254, subd.(r))
- Records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency.
- (See Gov. Code, § 6254.10)
- Nothing in this chapter requires disclosure of records that relate to archaeological site information and reports maintained by, or in the possession of, the Department of Parks and Recreation, the State Historical Resources Commission, the State Lands Commission, the Native American Heritage Commission, another state agency, or a local agency, including the records that the agency obtains through a consultation process between a California Native American tribe and a state or local agency.

47

## General Information Disclosures Allowed

- (Pub. Resources Code, § 21082.3, subds. (c)(4) & (f))
- The lead agency is allowed to describe information in general terms in the EIR to inform the public of their decision without breaching confidentiality.

48



## Tribal Consent to Disclosure

- (Pub. Resources Code, § 21082.3, subd. (c)(1))
- The tribe providing the information to the agency as part of the consultation process may (optional) consent to the disclosure of the information in the EIR or otherwise.
- The consent must:
  - ✓ Be prior to any disclosure
  - ✓ Be in writing
  - ✓ Specify if consenting to all information provided or only some of the information provided.

49

## Permitted Exchange of Information

- (Pub. Resources Code, § 21082.3, subd. (c)(1))
- The confidential exchange of the submitted information between public agencies that have lawful jurisdiction over the preparation of the environmental document.
- (Pub. Resources Code, § 21082.3, subd. (c)(2)(A))
- The confidential exchange of the submitted informatio among the lead agency, the tribe, the project applicant, and the project applicant's agent.

50

50

## No Disclosures by Applicant or Their Agent

- (Pub. Resources Code, § 21082.3, subd. (c)(2)(A))
- The project applicant or the project applicant's legal advisors, using a reasonable degree of care, shall maintain the confidentiality of the information exchanged for the purposes of preventing looting, vandalism or damage to a tribal cultural resource and shall not disclose the information to a third party.

51

51

## Data Exempt from Confidentiality

- (Pub. Resources Code, § 21082.3, subd. (c)(2)(A))
- Data is exempt from confidentiality if:
  - Already publicly available.
  - Already in the lawful possession of the project applicant before it was provided by the tribe.
  - Independently developed by the project applicant or the project applicant's agents.
  - Lawfully obtained by a third party.

52

52